D.P.U. 95-75

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.P.U. Nos. 86 through 88, filed with the Department on June 15, 1995, to become effective July 1, 1995, by Fitchburg Gas and Electric Light Company.

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TABLE OF CONTENTS

I. PROCEDURAL HISTORY

On June 15, 1995, Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company") filed with the Department of Public Utilities ("Department") proposed tariffs for Energy Bank Service ("EBS"), M.D.P.U. Nos. 86 through 88, to become effective July 1, 1995. The proposed tariffs established a new class of service offering market-based pricing for new or expanding industrial customers. On June 30, 1995, the Department suspended the operation of the rates until December 1, 1995. The investigation was docketed as D.P.U. 95-75.

Pursuant to notice duly issued, the Department conducted a public hearing and procedural conference on September 11, 1995. The Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention pursuant to G.L. c. 12, § 11E. No other petitions to intervene were received by the Department.

The Department conducted an evidentiary hearing at its offices on October 10, 1995. In support of its filing, the Company presented the testimony of Frederick J. Stewart, Assistant Vice President, Market Planning and Pricing for UNITIL Service Corporation,[1] and Paul Weiss, Assistant Vice President, Planning and Procurement for UNITIL Service Corporation. The Attorney General did not sponsor a witness. The evidentiary record consists of 65 exhibits and the Company's responses to two record requests.

On October 9, 1995, the Company filed a Motion for Protective Treatment of Confidential Information pursuant to G.L. c. 25, § 5D. The Company asserted that its response to Attorney

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[1] Fitchburg Gas and Electric Light Company and UNITIL Service Corporation are both wholly-owned subsidiaries of UNITIL Corporation, a registered utility holding company (Tr. at 6). UNITIL Service Corporation provides management services to Fitchburg and prepared the EBS filing (id.).

General Information Request 1-5 (Exhibit AG-1-5) contained confidential marginal cost information which reflected the Company's commercially sensitive market transactions, and sought to protect these terms from public disclosure in order to maintain its competitive position. According to the Company, this information was the type of confidential, competitively sensitive or proprietary information subject to protection under G.L. c. 25, § 5D. The Attorney General did not object to the Company's motion and entered into a non-disclosure agreement with the Company relating to this information. The Department finds that the Company has provided sufficient reasons to protect the information in Exhibit AG-1-5 as requested, and therefore grants the Company's Motion for Protective Treatment of Confidential Information.

On October 16, 1995, the Hearing Officer issued a Procedural Memorandum containing briefing questions. The parties submitted simultaneous initial briefs on November 2, 1995, and reply briefs on November 7, 1995.

II. THE COMPANY'S PROPOSAL

A. Introduction

Under the EBS, Fitchburg proposed to sell market-based power to new or expanding industrial customers (Exh. FGE-1, Technical Memorandum at 2). Fitchburg proposed three tariffs for a new class of service available to new or expanding industrial customers with an incremental load of at least 200 kilowatts ("kW") (id., Technical Memorandum at 2-3). According to the Company, these customers would otherwise take service under the Company's existing Rate G-3 (id., Technical Memorandum at 2). The Company contended that the EBS is priced competitively with average industrial rates in the United States (id., Technical

Memorandum at 1). Since Fitchburg is not in an excess capacity situation, the Company indicated that it anticipates meeting power requirements for EBS customers from wholesale markets through short-term contracts of one month or less (Exh. DPU-1-12; Tr. at 11-12). According to the Company, the EBS tariffs were designed to cover all incremental costs and ensure that EBS customers provide a contribution toward Fitchburg's fixed costs (Exh. DPU-1-1). Fitchburg asserted that EBS pricing is fundamentally different from existing electric pricing, because the power supply component of the rates is based on market-based marginal cost pricing as opposed to average power costs (Exh. FGE-1, Technical Memorandum at 3).

In addition, Fitchburg proposed to require EBS customers to construct new or expanded facilities in accordance with appropriate cost-effective energy efficiency standards (id., Technical Memorandum at 2). Therefore, EBS customers would not be eligible for demand-side management funding nor would they be subject to the conservation charge (id.).

The Company anticipated that customers would apply for the EBS through 1996 and that EBS customers would be required to begin service within two years of receipt of Fitchburg's written intent to provide service (id.). According to the terms of the proposed tariffs, EBS customers could enter into contracts[2] for an initial term of at least three, but not more than five years[3] (id., M.D.P.U. No. 86, at 3). After the conclusion of the initial term, service would

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[2] The Company also referred to the contract as a service agreement (Exh. FGE-1, M.D.P.U. No. 86, at 2).

[3] The Company stated that it may require an initial term longer than five years if it determined that the estimated annual revenue from a potential EBS customer was insufficient in comparison to the necessary commitments to provide service to such customer (Exh. FGE-1, M.D.P.U. No. 86, at 4). See footnote 13, below.

continue until cancelled by either party upon 180 days written notice prior to May 1 or November 1 of each year (Exh. FGE-1, M.D.P.U. No. 86, at 3, Technical Memorandum at 2).

Fitchburg stated that initially, it would arrange EBS customers' power supply requirements, but that in the future, upon completion of a system integration with UNITIL Power Corp. ("UPC"), the Company would enter into a separate power supply agreement with UPC to provide all power supply requirements for EBS customers (id. at 4).

The Company stated that its filing is designed to encourage economic growth in Massachusetts and to meet the demands of the evolving energy marketplace (id., Technical Memorandum at 1). According to Fitchburg, its proposal addresses the transition toward a restructured electric industry by attracting economic growth and avoiding economic erosion (Company Brief at 1). The Company asserted that the EBS would provide certain customers with expanded choice, but would not shift costs or risks to remaining customers (id.). In addition, the Company asserted that the EBS will provide Fitchburg's customers with an opportunity to experiment with market pricing (id., Exh. AG-1-13).

According to Fitchburg, the EBS would provide both immediate and long-term benefits to all customers through: (1) increased economic activity; (2) the inclusion of revenues attributable to the EBS in the calculation of all customers' fuel charges; and (3) the issuance of Energy Bank Power Dividend ("EBPD") certificates to all customers (Exh. FGE-1, Technical Memorandum at 1-6).

B. Description of Tariffs

1. Energy Bank Service, Schedule EB

The proposed Schedule EB consists of the following fixed charges: (1) a service charge of $2,000 per month; (2) a facility charge of $10 per kilovoltampere ("kVa") in excess of 200 kVa; and (3) an energy charge of $0.00118 per kilowatthour ("kWh"). The EBS customer would also be subject to the average fuel cost per kWh that is charged to all Fitchburg customers (Exh. FGE-1, M.D.P.U. No. 86, at 2, Sch. 1).

Provisions in Schedule EB require that, after the conclusion of the EBS term, a customer who wishes to return to the general service rate (e.g., Rate G-3) must pay any incremental costs that the Company may incur in transferring that customer from the EBS to average cost service (id. at 4; Exh. DPU-1-19).

2. Energy Bank Market Supply Cost Adjustment, Schedule EBMSCA

The proposed Schedule EBMSCA consists of the following charges: (1) a variable energy cost per kWh that varies from hour to hour based on the Company's marginal energy price; (2) a variable demand cost that varies based on market transactions; and (3) a fixed demand cost of $3.50 per kW, which is set to recover Fitchburg's fixed power supply costs in addition to wholesale capacity and energy costs[4] (Exh. FGE-1, Sch. 1). EBS customers would also receive an average fuel cost adjustment credit to their base rate, equal to the entire amount of the fuel charge assessed under Schedule EB (id., Technical Memorandum at 4). The proposed tariff defines the demand-related components of the rate as a demand adjustment, determined by dividing the sum of the fixed demand costs and the variable demand costs (determined pursuant to the "Energy Bank Power Supply Procedure" dated June 15, 1995, which sets forth the procedures

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[4] The Company defines these additional costs as transmission, services provided by NEPOOL, supply management, and administrative services (Exh. FGE-1, Sch. 3, at 2).

for determining the power supply charges for EBS), by the sum of all the Company's Energy Bank customers' billing demands, calculated to the nearest cent per kVa (id., M.D.P.U. No. 87). The Company's proposed tariff defines the energy-related component of the rate as an energy adjustment, determined by multiplying the customers' usage by the variable energy rate determined pursuant to the "Energy Bank Power Supply Procedure" dated June 15, 1995 (id.). The Company proposed to include the revenues received from these charges in the calculation of the average fuel cost for remaining customers (id., Technical Memorandum at 5-6; Exh. DPU-2-1, at 5).

3. Energy Bank Power Dividends, Schedule EBPD

The proposed Schedule EBPD consists of revenues derived from the sum of the service charge, facility charge, and energy charge from Schedule EB minus the sum of the following: (1) contributions to existing system costs (e.g., local transmission and distribution costs, calculated on an annual basis); (2) all incremental system costs (e.g., operation and maintenance expenses, and taxes on the incremental investment required to connect energy bank customers); (3) administrative costs (e.g., special billing and customer service); and (4) the Seabrook amortization charge (Exh. FGE-1, M.D.P.U. No. 88). The resulting difference would be divided by the total number of eligible customers in the Company's service territory (id.).[5]

The Company proposed to provide all customers with EBPD certificates on May 31 of every year that must be redeemed by the following December 31 (id.). Fitchburg indicated that two additional mechanisms could be built into the billing system to: (1) automatically credit any

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[5] Fitchburg defined eligible customers as any account of record during the billing month of May in which the Company awards EBPD certificates (Exh. FGE-1, M.D.P.U. No. 88).

customer during the year who discontinues service and receives a final bill, but has not redeemed the certificate; and (2) automatically credit any existing customer who did not redeem the certificate by December (Tr. at 86).

III. STANDARD OF REVIEW

A. Positions of the Parties

1. The Attorney General

The Attorney General submits that the EBS proposal should be reviewed under a modified form of the standard of review for economic development rates ("EDR") set forth in Commonwealth Electric Company, D.P.U. 93-41 (1993) (Attorney General Brief at 11). He urges that the Department should find that the proposed Energy Bank rates are in the nature of EDR because they are designed expressly "to encourage economic growth in Massachusetts" and "provide significant benefits to all of [Fitchburg's] customers in the form of greater local economic activity, reduced power costs, investments in [Fitchburg's] transmission and distribution system, and direct cash benefits ..." (id. at 10-11, citing Exh. FGE-1, Technical Memorandum at 1).

The Attorney General contends that the EBS proposal was not filed as a standard EDR because Fitchburg claims not to have any excess capacity (id. at 11, citing Exh. DPU-1-4). He submits that the Department should ensure that the proposed tariffs meet the eligibility standards set forth in D.P.U. 93-41, but that the standards relating to availability of excess capacity need not be applied (id.). Moreover, the Attorney General emphasizes that the principle which should guide the Department's deliberations in this matter is that of achieving benefits for all customers (new and old alike) while ensuring against any harm or unfairness to existing customers (id. at 5).

2. The Company

Fitchburg asserts that the Department should apply the just and reasonable standard of review to the proposed EBS tariffs (Company Brief at 7). In addition, the Company stated that the Department should apply this standard to the three proposed tariffs as a whole and consider whether the new class of service proposed by the Company is a reasonable classification which does not result in unduly discriminatory rates (id., citing Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 602 (1944)). Fitchburg contends that the EBS tariffs establish a reasonable classification, provide just and reasonable rates, and provide benefits to all of Fitchburg's ratepayers (id. at 2, 7; Tr. at 8-9).

Contrary to the Attorney General's assertions, the Company states that it does not view the EBS as a traditional EDR, because it does not reflect a discount based on excess capacity, but rather represents a new class of service (Exh. DPU-1-4; Company Reply Brief at 2). Furthermore, the Company asserts that the EBS tariffs comport with the EDR standard, including the Attorney General's caveat regarding excess capacity, because the rates increase overall contribution to fixed costs thereby providing benefits to Fitchburg ratepayers, and are intended to spur economic growth (Company Reply Brief at 2).

B. Analysis and Findings

In investigating rate proposals by utility companies, pursuant to G.L. c. 164, § 94, the Department has previously determined whether proposed rates are just and reasonable. Incentive Regulation, D.P.U. 94-158, at 42, 52 (1995); Boston Gas Company, D.P.U. 92-259, at 42 (1993); Colonial Gas Company, D.P.U. 93-78, at 6 (1993). Rates also may not be unjustly

discriminatory. Massachusetts Oilheat Council v. Department of Public Utilities, 418 Mass. 798, 804 (1994); Attorney General v. Department of Public Utilities, 390 Mass. 208, 234 (1983), citing American Hoechest Corp. v. Department of Public Utilities, 379 Mass. 408, 411 (1980); Incentive Regulation, D.P.U. 94-158, at 42 (1995); Commonwealth Electric Company, D.P.U. 93-41, at 20 (1993). The Department has also been guided in its evaluation of rates by its obligation to serve the public interest. See Boston Real Estate Board v. Department of Public Utilities, 334 Mass. 477, 495 (1956) ("the controlling consideration of the public interest in the exercise of the Department's statutory regulating power is implicit throughout the statute"). The Department has required companies which sponsor special programs or new rates to demonstrate that the program is in the public interest by providing benefits to ratepayers. Massachusetts Institute of Technology/Cambridge Electric Light Company, D.P.U. 94-101/95-36, at 78, 85 (1995); Boston Gas Company, D.P.U. 92-259, at 28 (1993).

Recently various electric companies with short-term excess capacity have proposed tariffs that provide discount rates to commercial and industrial customers in order to stimulate economic development. Commonwealth Electric Company, D.P.U. 93-41 (1993). The Department stated that its primary goal in approving any such EDR for a company with excess capacity was "to increase the overall contribution to a utility's fixed costs ... and thereby benefit all customers." Id. at 9. The EBS has several similarities to EDRs. EBS is designed to stimulate economic activity, and, more importantly, provides a contribution to Fitchburg's fixed costs and benefits to all the Company's customers. However, Fitchburg does not have excess capacity. As noted above, instead of selling excess capacity at a discount, Fitchburg plans to purchase new power with

short-term contracts to resell to eligible customers. This and other differences from the EDRs approved by the Department for other utilities are sufficient to warrant different treatment of the EBS tariffs. On balance, the Department determines that it is more appropriate to apply to the EBS tariffs the standard of review applicable to tariffs in general. Accordingly, the Department will review the EBS tariffs to determine whether they produce rates that are just and reasonable. In so doing, the Department will continue to focus on whether the proposed tariffs are in the public interest by providing benefits to all customers.

IV. CONSISTENCY WITH STATUTE, REGULATION, AND PRECEDENT

A. Positions of the Parties

1. The Attorney General

The Attorney General states that pursuant to G.L. c. 164, § 94, gas and electric companies are required to file with the Department documentation "showing all rates, prices and charges" which a utility may charge either under a tariff of general availability or a special contract (Attorney General Brief at 7). The Attorney General submits that in Boston Gas Company, D.P.U. 92-259, at 43 (1993) and Dedham Water Company, D.P.U. 13271 (1961), the Department stated that "an important element of these tariff filing requirements is that the rate schedules must be so construed that the Department as well as members of the general public can properly apply them by reference to the schedules themselves" (id.). The Attorney General argues that the tariffs in question do not satisfy the Department's standards and, thus, should not be approved unless modified (id.).

The Attorney General maintains that the proposed M.D.P.U. 87, Schedule EBMSCA

contains a reference to the "Energy Bank Power Supply Procedure" dated June 15, 1995, in its explanation of the Demand and Energy Adjustment calculations, but that the procedure does not appear in the tariff pages and has only been produced as Exhibit FGE-1, Schedule 3 (id. at 8). The Attorney General contends that this does not comply with the Department requirement that rate schedules be understood by reference to themselves (id.). However, the Attorney General recommends that Fitchburg should be allowed to amend its tariffs to include the Energy Bank Power Supply Procedure within the terms of the tariffs (id.).

2. The Company

Fitchburg acknowledges that G.L. c. 164, § 94 requires rate schedules to show all rates, prices and charges, and that 220 C.M.R. § 5.02(3) requires schedules to show "not only the price or unit upon which based, but any and all meter rentals, service charges, basis for determining demand..." (Company Brief at 10). Fitchburg contends that the proposed tariffs provide a specific, verifiable, and non-discretionary formula under which the Department and the public may calculate and verify the rate based upon the stated fixed and variable components (id.). The Company maintains that the tariffs are thus consistent with both statutory and regulatory requirements because they provide the specific description of the adjustments by referencing, and thus incorporating, the June 15, 1995 Procedure for Determining Power Supply Charges for Energy Bank Service (id. at 11-12). Furthermore, the Company asserts that there is no statutory or regulatory requirement that tariffs contain only fixed-price per unit charges (id. at 12). The Company asserts that the Department has previously recognized that prices may be based on changing market factors (id.).

Fitchburg distinguishes its proposal from that of Boston Gas Company in D.P.U. 92-259 (1993), where prices in a proposed tariff were "subject to negotiation" (id. at 13, citing Boston Gas Company, D.P.U. 92-259, at 47-48 (1993)). The Company states that the EBS rates are not comparable to those prices, because the charges are not subject to negotiation or unilateral change by the Company and are based on a non-discretionary and "auditable" formula (id. at 14).

The Company also distinguishes its proposal from that of Dedham Water Company in D.P.U. 13271 (1961), where the proposed tariffs failed to provide availability clauses describing the customers to whom the rates were applicable (id. at 14-15, citing Dedham Water Company, D.P.U. 13271, at 9-10 (1961)). Fitchburg argues that the EBS tariffs provide a detailed description of availability and customer eligibility criteria for the service (id. at 15).

Finally, Fitchburg distinguishes its proposal from that of RCI Corporation in D.P.U. 86-252 (1987), where RCI Corporation proposed a range of rates which would allow RCI to change the proposed rates unilaterally without subsequent review from the Department (id., citing RCI Corporation, D.P.U. 86-252, at 1-2 (1987)). The Company maintains that the EBS rates are not comparable to those rates because the charges can be calculated based on a variable input and are verifiable by the customer or the Department (id. at 16).

Although it considers the tariffs, as proposed, to be consistent with the statute, Department regulations, and Department precedent, the Company does not object to the Attorney General's recommendation to incorporate the Energy Bank Power Supply Procedure information into Schedule EBMSCA (Company Reply Brief at 3).

B. Analysis and Findings

G.L.c. 164, § 94 states in part that "[g]as and electric companies shall file with the department schedules, ... showing all rates, prices and charges to be thereafter charged or collected within the commonwealth...." The Department has promulgated regulations to implement the language of this statute: "[t]ariffs and schedules shall show plainly all requisite detail fully to explain the basis of all charges to be made and all rules and regulations governing the same." 220 C.M.R. § 5.02(3)(b).

The Supreme Judicial Court ("SJC") has approved the application of formulas that produce variable rates. Before the adoption of the fuel charge statute, G.L. c. 164, § 94G, the adjustment of rates pursuant to a fuel adjustment clause in a rate schedule approved under G.L. c. 164, § 94, was challenged because no public hearings were held prior to the adjustment. Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities, 368 Mass. 599 (1975). The SJC found that the adjustment of rates through application of the formula of a fuel adjustment clause was not a change of rates requiring a Department proceeding under G.L. c. 164, § 94. Id. at 604-605. The SJC stated that the Department's finding in D.P.U. 18209/18221 (1975) that "[a]s long as the clause (the formulae) remains fixed, the mathematics resulting from the clauses' operation do not constitute a `general increase in rates, prices and charges'" was consistent with a prior SJC decision upholding an insurance rate expressed not in dollars but in terms of a formula.[6] Id. at 604-605. The same court noted that

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[6] In Century Cab Inc. v. Commissioner of Insurance, 327 Mass. 652, 664 (1951), the Court rejected an argument that employing a formula to determine the rates under the experience rating plan did not "fix and establish" premium charges in compliance with G.L. c. 175, § 113B. The Court stated that "[a] rate may be fixed where its elements are settled and where all that remains to be done is to combine those elements by the employment of a definite rule, or as here by mathematical process." Id.

this view reflected "long administrative practice and understanding" and was consistent with rulings in other states. Id. at 605-608. The SJC also favorably quoted a Virginia State Corporation Commission's remarks regarding rate schedules, stating "[a] charge that can be computed by a fixed mathematical formula is as firmly fixed as a charge that is stated in terms of money." Id. at 608 n. 12.

In addition, the SJC recently affirmed a Department decision that calculation of a hookup charge by incorporating data on electrical load into a standardized worksheet constituted elements sufficiently fixed as to allow for determination of the amount of the fee. Bertone v. Department of Public Utilities, 411 Mass. 536, 547 (1992).[7] The Court stated that "the Department correctly found that the calculation process `employ[s] ... a definite rule or ... mathematical process' to `elements [that] are settled.' Id., citing Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities, 368 Mass. 599, 605 (1975).[8]

The Department has required that tariffs clearly indicate the rates and terms applicable to the service described, stating that "[r]ate schedules must be so constructed that the Department's own staff, as well as members of the public, can properly apply them by reference to the schedules themselves." Dedham Water Company, D.P.U. 13271, at 10 (1961). The Department has also required that tariffs be sufficiently detailed to determine the basis for charges included, and has

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[7] Hull Municipal Lighting Plant instituted the hookup charge in question pursuant to its authority as a municipal lighting plant to set rates, G.L. c. 164, §§ 34-69A. Bertone, 411 Mass. at 542-543.

[8] In Bertone, 411 Mass. at 547, the SJC also cited Arsenault v. Peabody, 6 Mass. App. Ct. 907 (1978), where a municipal power plant's use of a fuel adjustment clause that provided for fluctuations in unit costs of electricity according to changes in fuel prices was held to be a fixed rate within the meaning of G.L. c. 164, § 58.

rejected nonconforming tariffs, explaining that "[t]here is insufficient detail included in the proposed Tariff to explain the basis for the rate to be charged for the offered services." Boston Gas Company, D.P.U. 92-259, at 47 (1993).

In summary, the SJC has approved the use of formulas in ratesetting in the past, including in the context of G.L. c. 164, § 94. In addition, the Department requires that rates must be sufficiently detailed to determine the basis for the charges included. Therefore, the Department finds that a tariff that contains a methodology which clearly defines the calculation of a rate, and contains sufficient detail to determine the basis for the charges therein, would comport with G.L. c. 164, § 94, 220 C.M.R. § 5.02(3), SJC and Department precedent.[9]

The Attorney General has noted that the explicit methodology for determining the variable portion of the EBS rate is included in the Energy Bank Power Supply Procedure that is referenced by, but not incorporated into, Schedule EBMSCA. Direct incorporation of the Energy Bank Power Supply Procedure into Schedule EBMSCA would provide the complete methodology to allow calculation of the rate, with reference to external indices, by the Department and the

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[9] The Department further notes that it has wide discretion in choosing its approach to rate regulation pursuant to G.L. c. 164, § 94 by selecting among different theories or methods. Incentive Regulation, D.P.U. 94-158, at 43 (1995). See also Massachusetts Oilheat Council v. Department of Public Utilities, 418 Mass. 798, 807 (1994) (citing Attorney General v. Department of Public Utilities, 392 Mass. 262, 268-269 (1984). The United States Supreme Court has confirmed the States' latitude to determine ratesetting methodology. See Duquesne Light Company, 488 U.S. 299, 316 (1988) ("[t]he Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public"). The Department has adopted alternative forms of regulation in response to changing market conditions. See Incentive Regulation, D.P.U. 94-158 (1995); New England Telephone and Telegraph Company d/b/a NYNEX, D.P.U. 94-50 (1995); Boston Gas Company, D.P.U. 92-259 (1993).

sophisticated customers to whom this rate is available. In addition, the EBS tariffs as amended would be consistent with G.L. c. 164, § 94, because the Company could not unilaterally change the rates in this tariff and bypass Department review. As so amended, the proposed tariffs would thus satisfy the primary requirements of a tariff: to describe publicly all rates, terms and conditions, and to be available to all who qualify without discrimination. See Commonwealth Electric Company, D.P.U. 93-41, at 20 (1993). Therefore, the Department finds that the tariffs proposed by the Company, if modified to incorporate the Energy Bank Power Supply Procedure which contains the explicit methodology for determining the variable portion of the rate, would contain sufficient detail to determine the basis for the charges and for the Department to make a finding regarding the just and reasonable nature of the rates, thus comporting with the applicable statute, regulations, and precedent.

V. FEATURES OF THE EBS PROPOSAL

A. Introduction

The Company stated that the EBS is a step toward a more competitive electric market and provides a means for Massachusetts to capture and retain new and expanding businesses during the transition toward a restructured industry (Exh. FGE-1, Technical Memorandum at 6). According to Fitchburg, EBS promotes the Department's goals of lowering energy costs, providing greater customer choice and ensuring that all customers benefit (id.). Fitchburg indicated that it anticipates that the EBS will be an integral component of a future restructuring plan because it accomplishes many of the Department's goals for restructuring (Exh. DPU-2-4).

The Department considers the application of innovative tariffs such as the EBS a positive

development that should increase customer choice and lead to more competitive rates in the future. The Department next evaluates the following features of the EBS proposal: (1) whether the EBS customers should be exempted from any future stranded cost charges; (2) whether additional safeguards are necessary to ensure that incremental power costs for EBS customers do not exceed EBS revenues in the fuel charge; and (3) whether the Company should issue redeemable EBPD certificates or automatically credit customers' bills.

B. Recovery of Stranded Costs and Ratemaking Treatment of EBS Revenues and Expenses

1. Positions of the Parties

a. The Attorney General

The Attorney General asserts that Fitchburg has not proposed a restructuring plan but rather a new market-based tariff (Attorney General Brief at 12). He argues that approval of the proposal should not be seen as resolving the question of whether EBS customers will be assessed their allocable share of any "stranded costs" which the Department may find to be recoverable by the Company in the event of industry restructuring (id.). He submits that to the extent that the Company intends to reserve the right to increase the EBS rates to cover a pro rata allocation of either strandable or recoverable stranded costs, it should be directed to make that reservation of rights clear to potential EBS customers so that any investment or locational decisions are made with the full knowledge of potential future changes in their rates (id. at 12-13).

As an additional point, the Attorney General argues that the "Company's shareholders should bear the amount of any discount implicit in the new tariff relative to the G-3 tariff" (id. at

12).[10]

b. The Company

According to Fitchburg, the EBS will provide new and expanding industrial customers with greater customer choice and access to wholesale market prices, consistent with the Department's restructuring goals (Company Brief at 19). Fitchburg claims that the EBS is consistent with the Department's restructuring goals even though the Company supports an exemption for EBS customers from a specific stranded cost charge in the future (Exh. DPU-2-3; Tr. at 53; Company Brief at 19-20). Furthermore, Fitchburg claims that the EBS will not increase, but rather will mitigate the Company's potentially strandable costs by relying exclusively on short-term power supplies to serve EBS load and requiring a contribution to the Company's fixed costs (Company Brief at 20). Despite the Company's testimony that the EBS customer should not be assessed future stranded cost charges, Fitchburg acknowledges that the EBS is a tariffed service that would be subject to any stranded cost recovery mechanism that the Department may approve in the future (id.). However, the Company argues that the Department need not reach a decision regarding the issue of the applicability of stranded cost charges to EBS customers, since it is premature in this proceeding (id.).

Fitchburg asserts that the EBS tariffs provide no discount to EBS customers at the expense of other customers and requests that the Department defer any decision regarding

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[10] The Attorney General notes that, with the exception of the inclusion of charges for the Company's amortization of its Seabrook costs, the amount of the "discount" is, by definition, equal to the amount of the Company's strandable costs: the difference between the market price of power and the Company's embedded cost of power (Attorney General Brief at 12, n. 3). The Company's embedded cost of providing service for large industrial customers is the Company's Rate G-3 (Exh. AG-1-13).

ratemaking treatment (Company Reply Brief at 4).

2. Analysis and Findings

The Department has determined that in a transition from a regulated to a competitive industry structure all electric companies shall file restructuring plans. D.P.U. 95-30, at 46-48. In the case of Fitchburg, the Company must submit its restructuring proposal within three months of the issuance of the Department's Orders related to the restructuring proposals of Boston Edison Company, Massachusetts Electric Company and Western Massachusetts Electric Company. Id. at 48. One of the restructuring transition principles adopted by the Department in D.P.U. 95-30 is to honor existing commitments. Id. at 29. The Department stated that each company would have a reasonable opportunity to recover net, non-mitigable, stranded costs[11] associated with commitments previously incurred pursuant to their legal obligations to provide electric service. Id. The Department further stated that any stranded cost recovery mechanism should provide for a non-discriminatory charge that cannot be bypassed. Id. at 30. In other words, customers cannot be insulated from Department directives regarding restructuring. As the Department has stated, "[o]ne customer class may not reap the benefits [of restructuring] at the expense of another." Id. at 15.

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[11] The Department defined stranded costs as the following: (1) the amount of book cost or fixed cost associated with producing electricity from existing generation facilities that might not be recovered by the competitive market price for generation; (2) liabilities for future decommissioning and radioactive waste disposal associated with nuclear power plants that might not be recovered by the market price; (3) the amount by which the cost of existing contractual commitments for purchased power exceeds the competitive market price for generation; and (4) prudently incurred regulatory assets related to generation that were intended to be collected over time consistent with regulatory precedent or order. D.P.U. 95-30, at 32.

Therefore, Fitchburg's restructuring proposal must include a stranded cost recovery mechanism applicable to all customers, including EBS customers. We expect that to the extent that the Company's restructuring plan contains a stranded cost charge, consistent with the principle enunciated in D.P.U. 95-30 that stranded cost recovery mechanisms shall be non-bypassable and non-discriminatory, such stranded cost charge will apply to all customers, including EBS customers.

Accordingly, we direct the Company in its compliance filing to include in Schedule EB and in the service agreement applicable to EBS customers provisions stating that the structure and design of the EBS may change as a result of the implementation of the Company's restructuring plan and that such changes would be applicable to EBS customers. Alternatively, the service agreement could be based upon the tariff and Schedule EB would contain a provision stating that the structure and design of the EBS may change as a result of the implementation of the Company's restructuring plan. The Department further directs the Company to provide with its compliance filing a copy of a proposed standard offer service agreement for the Department's review and approval.

With respect to the Attorney General's argument regarding the "discount" implicit in the EBS, the Company repeatedly states that the EBS is not a discounted rate, but rather is a new tariffed service for an identified class of customers (Exhs. DPU-1-4; DPU-2-2; Company Brief at 1). Fitchburg also asserts that there will be no lost revenues that need to be recovered (Tr. at 8). Nevertheless, the Company requests that the Department explicitly defer the decision on the future ratemaking treatment of expenses and revenues associated with the EBS (Company Reply

Brief at 4). The Department finds that there is no need at this time to make a finding on whether or not a "discount" is associated with the EBS, nor a finding regarding any ratemaking treatment of the revenues and expenses of the EBS.[12,13]

C. Fuel Charge Revenues

1. The Company's Proposal

Fitchburg proposed that incremental power supply costs under the proposed EBS be reflected in the average costs paid by all customers (Exh. FGE-1, Technical Memorandum at 5). However, according to the Company, incremental costs always would be more than offset by EBS revenues (id.). Specifically, the mechanism proposed by the Company would add the power costs of existing customers to those of EBS customers (Exh. DPU-2-1, at 5). From that total, the revenues collected from EBS customers, consisting of variable demand, variable energy and fixed demand costs would be subtracted from total power costs to arrive at net power costs, which when divided by the existing customers' total load, result in average power costs per kWh less than they would have been absent the existence of the EBS (id.).

2. Positions of the Parties

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[12] However, the Department notes that in a recent rate case, the Department denied recovery of discounts from tariffed rates, stating that "a policy that would allow the Company to recover the ... discount from other ratepayers would be inconsistent with an evolving competitive marketplace and the Department's goal of increasing competition and expanding customer choices." Massachusetts Electric Company, D.P.U. 95-40, at 143 (1995).

[13] The Department notes that the proposed tariffs are silent regarding the departure of an EBS customer from the EBS prior to the conclusion of the initial term. The Department expects that the Company's remaining customers will not bear the consequences of such early departure. The Department's concern is heightened where the Company may require an initial term of longer than five years. See footnote 3, above.

a. The Attorney General

The Attorney General submits that the Company should not be permitted to include any new costs in its fuel charge without first demonstrating that on a per kWh basis, they are less than the revenues recovered under Schedule EBMSCA (Attorney General Brief at 13). The Attorney General argues that given that the Company acknowledges that it may be required to secure additional power supplies to serve loads that it anticipates adding under the terms of its EBS proposal, as well as recently approved special contracts, the Department must ensure that the costs incurred to secure these new power supplies do not have an adverse impact on the Company's remaining customers (id.; Attorney General Reply Brief at 1). He maintains that because the Company plans to include within its fuel charge costs all amounts associated with new power supplies, any such new costs that are incurred will raise existing customer rates to the extent that such costs (on a per kWh basis including all demand charges as well as associated transmission costs) exceed the total amount of revenue collected under the variable portions of the EBMSCA, divided by the number of kWh sold under the EBS tariff (Attorney General Brief at 13-14). The Attorney General argues that it is incumbent upon the Department to put into place mechanisms to ensure that EBS costs never exceed EBS revenues (id.).

b. The Company

In response to the Attorney General's argument regarding the inclusion of costs and revenues in the calculation of the fuel charge, the Company maintains that the appropriate forum in which the Department can ensure that EBS incremental power acquisitions do not adversely impact remaining customers is the quarterly fuel charge proceedings (Company Reply Brief at 3-

4). Furthermore, according to the Company, separate tracking of EBS power supply costs and revenues will guarantee that remaining customers' costs do not increase as a result of the EBS and that rates for all Fitchburg customers will decrease from the additional contributions to fixed costs as EBS grows (Company Brief at 18).

3. Analysis and Findings

The record indicates that EBS revenues should more than offset EBS incremental power costs (Exh. FGE-1, Technical Memorandum at 5). In addition, because fuel for EBS customers is procured and tracked separately, the Company has provided a safeguard so that an increase in remaining customers' costs as a result of the EBS could be detected by the Department. Moreover, fuel charge proceedings provide the Department with the opportunity to confirm that the EBS power acquisitions do not adversely impact remaining customers (Tr. at 43). The Department directs the Company in future fuel charge filings to provide in a properly reviewable format the information necessary to determine the effect of the EBS on remaining customers. That is, the Company shall identify the EBS-related revenues and costs in its fuel charge filings. Accordingly, additional safeguards within the EBS tariffs are not necessary.

D. Schedule EBPD Certificates

1. Positions of the Parties

a. The Attorney General

The Attorney General argues that the Department should require the Company to return monies to its other customers in the form of bill credits rather than "Dividend Certificates" (Attorney General Brief at 14). To ensure that the Company's remaining customers receive full

value of the benefits that the Company promises as a result of the approval of its EBS proposal, the Attorney General submits that the Department should require that those benefits be made available to those customers automatically, through the use of a credit against current bills (id.). He asserts that this would cost less and would ensure that such benefits are actually enjoyed and not misplaced, forgotten, or otherwise lost (id.). He contends that the Company has not offered any rationale for the added expense and customer effort required by its proposal and that customers should not be required to pay for corporate "image" advertising (id.).

b. The Company

In response to the Attorney General's recommended modification to the EBPD, the Company argues that it does not anticipate a significant cost difference in administering the program using either an automatic credit or the EBPD certificates (Tr. at 87; Company Reply Brief at 6). Fitchburg also takes exception to the Attorney General's description of the EBPD certificates as corporate image advertising; the Company claims that the EBPD is an effective means of communication to the remaining customers of the benefits of the EBS (Company Reply Brief at 6). Fitchburg indicated that two additional mechanisms could be built into the billing system to: (1) automatically credit any customer who discontinues service during the year and receives a final bill, but has not redeemed the certificate; and (2) automatically credit any existing customer who did not redeem the certificate by December of each year (Tr. at 86).

2. Analysis and Findings

The Department concludes that there should be assurance that customers promptly receive the full value of the benefits that the Company promises in its EBS proposal. Therefore, the

Department finds that the Company shall automatically credit each customer's bills with the value of the Power Dividend. The Company proposes to issue the Power Dividends by May 31 of each year, therefore, the credit shall be applied in the next billing month. The Department accepts the Company's argument that the EBPD is an effective means of communication to the remaining customers of the benefits of the EBS. Therefore, the Company may include with customer's bills a Power Dividend Certificate with no monetary value but containing an appropriate explanation of the benefits of the EBPD. Accordingly, the Department directs the Company to modify Schedule EBPD to incorporate procedures to accomplish these changes.

VI. CONCLUSION

The EBS tariffs as a package create a new customer class to attract new or expanding industrial customers with current low, market-priced energy. Only customers eligible for the EBS tariff may receive the benefits of the power procured at market-based rates. However, the EBS customers also assume the risk that market prices may rise substantially during their contract term. Therefore, the Department finds that the EBS customer class is reasonably classified and not unduly discriminatory.

The Department further finds that the EBS proposal, as amended in accordance with this Order, will provide benefits to other customer classes through (1) the reduction in average fuel costs, (2) increased economic activity in Fitchburg's service territory, and (3) the EBPD credits. Therefore, the Department finds the EBS tariffs as so amended to be just and reasonable.

VII. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the tariffs, M.D.P.U. No. 86 through 88, filed with the Department on June 15, 1995, be and hereby are DISALLOWED; and it is

FURTHER ORDERED: That Fitchburg Gas and Electric Light Company shall file new tariffs and a standard offer service agreement in accordance with the directives contained in this Order; and it is

FURTHER ORDERED: That the new tariffs shall apply on or after the date of the Order, but shall not become effective earlier than seven (7) days after they are filed with supporting data demonstrating that such rates comply with this Order.

By Order of the Department,

_____
Mary Clark Webster, Commissioner

_____
Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).